STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

JAKE J. CESARE & SONS, Employer and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner	)	75-RC-47-F 2 ALRB No. 6

Pursuant to a Petition for Certification filed by the United Farm Workers of America, AFL-CIO ("UFW") on September 8, 1975, an election was conducted at the Jake J. Cesare and Sons Ranch on September 17, 1975.[1/]

Three employer's objections to the election were set for hearing and heard: (1) that the Board directed and conducted the election beyond the seven-day limit of Labor Code section 1156.3(a)(4)(2) that the Board agent conducting the election improperly closed the polls one half hour earlier than the time set in the Direction and Notice of Election; and (3) that an agent of the UFW made misrepresentations during the campaign.

I. Election Conducted beyond the seven-day period

As noted above, the Petition for Certification was filed on September 8, 1975, and the election was held on September 17, 1975 - nine days after the filing - contrary to the

[1/]The results of the election were UFW - 13 and no labor organization - 10. There were no void or unresolved challenged ballots.

statutory direction of Labor Code section 1156.3(a)(4). This Board decided in Klein Ranch. 1 ALRB No. 18 (1975), that the holding of an election beyond the seven-day period, while an irregularity in procedure, does not in itself invalidate the election for lack of jurisdiction. Our focus in Klein, and subsequently in William Dal Porto and Sons, Inc., 1 ALRB No. 19 (1975), was upon the possible prejudice to the parties or other persons resulting from the failure to conduct the election within seven days of the petition filing date.

As in Dal Porto, the record here discloses no reason for the Board Agent's decision to set the election on the ninth day. The election was not held on Tuesday, the eighth day, because it was Mexican Independence Day, and this Board had instructed regional directors not to conduct elections on that day unless all of the parties involved in the election agreed to that date. There is no indication as to why the election could not have been set for the seventh day - Monday, September 15, 1975. Thus, while the record does not reveal any reason for the delay, it similarly contains no evidence of impropriety or bias toward any party on the part of the Board Agent in setting the election for the ninth day. We proceed, therefore, to examine the impact of that decision in terms of prejudice to the parties and interested persons.

The list of employees submitted by the employer pursuant to section 20310(d)(2) of our regulations indicates that 25 employees were on the payroll during the period immediately preceding the filing of the petition. Of this total number of eligible voters, 23 cast valid ballots. No new employees were hired during

that period, and only two employees were absent from work on election day. No ballots were challenged on the ground that the voter's name did not appear on the eligibility list. It is clear, therefore, that employee turnover between the date of the employer's list and the date of the election was negligible. The voter participation in this election was an uncommonly high 92.7 percent, and the number of employees absent from work on election day was less than the margin of the UFWs victory on the tally. Furthermore, we find no evidence suggesting that any party was prejudiced in any way by the delay in holding the election. Accordingly, we conclude that the delay in holding the election does not warrant setting aside the election in this case.

II. Early Closing of the Polls

The polls in this election were scheduled to close at 9:00 a.m., but the testimony indicates that they were closed 15 to 30 minutes prior to that time.[2/] As mentioned above, 23 of the 25 eligible voters cast ballots in the election. The foreman of the crew testified that the 23 persons, all of whom were in his crew, had finished voting by about 8:30 a.m. The two persons on the

[2/]Although all of the election observers agreed to close the polls early, it was clearly improper for the Board Agent to do so. The fact that the observers agreed to the early closing does not alter the obligation of the Board Agent to comply with the schedule set forth in the Direction and Notice of Election. We subscribe to the principle stated by the NLRB in Alterman-Big Apple, Inc., 116 NLRB 1078 (1956):

> It is the Board's responsibility to establish the proper procedure for the conduct of its elections, which procedure requires that all eligible employees be given an opportunity to vote. As this is a matter of Board responsibility, it is not subject to waiver by the parties.

eligibility list who did not vote were absent from work on the day of the election, and neither had returned to work at this ranch as of the date of the objections hearing.

The employer alleges that one other person, Roberto De Leon "came to vote during the polling period."[3/] Mr. De Leon had been laid off at the ranch on July 26, 1973, and had not worked there since that time. There is no evidence that a strike occurred at that time or that Mr. De Leon participated in such a strike. Given the absence on the record of any evidence whatsoever supporting Mr. De Leon's eligibility to vote, we must find that Mr. De Leon was not eligible to vote in this election.

The National Labor Relations Board in comparable situations declines to overturn an election based on premature closing of polls absent a showing that eligible employees in a number sufficient to affect the outcome may have been denied opportunity to vote as a result.[4/]

[3/] The record does not support this assertion. Testimony of the crew foreman was that he had been approached by Mr. De Leon before the crew's break which is usually taken at 9:00 a.m., but he did not know the exact time of this encounter. The crew foreman's testimony was controverted by that of a UFW organizer who had also talked with Mr. De Leon on the morning of the election day. The organizer testified that Mr. De Leon did not arrive to vote until 9:45 a.m., and that he thought the election was scheduled for 7:00 a.m. to 10:00 a.m. Additionally, testimony of an election observer indicates that while the ballot box was sealed at approximately 8:35 a.m., the Board Agents and observers were at the polling place until about two minutes before 9:00 a.m. This observer stated that no one attempted to vote during that time.

[4/] Repeal Brass Manufacturing Co., 109 NLRB 4 (1954) wherein the polls were closed about two minutes early, the NLRB set aside the election stating:

> Proper election procedure requires every reasonable precaution that a full opportunity to vote be given those eligible . . . . Where, as here, those

(fn. cont. on page 5)

Thus, in Smith Co., 192 NLRB 1098 (1971), which involved both a delayed opening and premature closing of the polls, the NLRB upheld the election and adopted the Regional Director's report which stated:

> The delay in opening did not prejudice voters as all eligible voters present cast ballots and there were no prospective voters waiting in line to cast ballots when the polls were closed. The slight deviation does not appear to have deprived any voter of an opportunity to cast a ballot. Of the two eligible employees who did not vote, one was on leave of absence and the other was absent because of illness.

The two employees who did not vote in the Smith Co., election could not have affected the outcome of the election.[5/]

In the instant case as noted above, two of the 25 eligible voters did not vote in this election, and the margin of the union's victory was three votes. Accordingly, we refuse to set aside an election where, as here, the number of eligible voters who did not vote is not sufficient to have affected the outcome of the election and where there is no indication that they were deprived of an adequate opportunity to vote had they chosen to do so.

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fn. 4 cont.

> eligible voters who did not vote could affect the results of the election, the arbitrary selection of a particular timepiece over others available, . . . can only result in uncertainty over the correctness of the election return, which' is inconsistent with proper election procedures.

[5/] The union won the election by 14 votes out of 22 cast.

III. Campaign Misrepresentation

The alleged misrepresentation occurred on the morning of September 16, 1975, approximately 24 hours prior to the election. Three witnesses for the employer testified that they had overheard portion of a conversation between an unidentified representative of the UFW and Joe Salazar, a foreman at the ranch. Neither of these latter two persons testified at the hearing regarding the conversation.

The three witnesses testified that in response to a question asked by Mr. Salazar, the UFW representative mentioned the possibility of a reelection in 60 days if the workers were not satisfied with the contract.[6/] This question was asked by Mr. Salazar immediately after a statement by the UFW representatives to the effect that if the union won the election the contract would run for one year. Thus,

[6/] One witness testified:

> Then Joe [Salazar] asked her again what if we are not satisfied -- if you win the election, what if we are not satisfied, you know, with the election. She said you can have a reelection in 60 days if you are not satisfied with the contract or something like that.

Another witness testified:

> If Mr. Chavez was to win how long would it be and she said a year. And at any time the contract wasn't being run right or the way it is supposed to have been run, then we could have a reelection within 60 days.

Finally, in testimony the third listener stated:

> Joe Salazar asked her about the contract; it was one year, and she said yes. And if they didn't like what was happening that in 60 days they could have a re-election.

the context of the statement to some degree contradicted the alleged misrepresentation, reducing its potential impact. Furthermore, while any statement indicating that another election could be held in 60 days would be a misrepresentation of the law (Labor Code section 1156.5), the offending statement made in this case is also reasonably susceptible to the interpretation that it was a vaguely phrased reference to Labor Code section 1156.7 which provides for the decertification of representatives by the filing of a petition 60 days prior to the expiration of an agreement.

The National Labor Relations Board, over a decade ago, in the case of Hollywood Ceramics, 140 NLRB 221 (1962) established the policy that elections would be set aside because of campaign misrepresentations only where (1) the misrepresentation was substantial enough to have influenced the voters' choice, (2) the subject matter of the misrepresentation was close enough to election issues to influence the voters, (3) the opposing party did not have adequate opportunity to reply to the misrepresentation before the election, (4) the misrepresentation came from a party having special knowledge of the subject matter, so the voter would be likely to reply on its accuracy, and (5) the voters lacked independent knowledge of the subject. Since that time, the NLRB itself has attempted to make clear its position that the guidelines set forth in Hollywood Ceramics should be regarded as just that - guidelines - and the NLRB will not rigidly apply them to set aside elections without considering the ultimate question of whether the alleged misrepresentation is likely to have a real impact on the election. Modine Manufacturing Co., 203 NLRB 527 (1973). Furthermore, the NLRB has cautioned that in considering alleged misrepresentations in elections campaigns, it will not be "over-ready"

to disregard the secret ballot choice of a majority of the eligible voters and will not apply such unrealistic standards of campaign statements that would make it almost inevitable that any hard-fought campaign must be overturned. Modine Manufacturing Co., supra.

The NLRB's reservations regarding a strict, mechanical application of the Hollywood Ceramics criteria are well taken. Furthermore, we have some doubt whether the Hollywood Ceramics standard, being based as it is on the NLRB notion that representation elections can be conducted under laboratory conditions and can be easily rerun where the circumstances surrounding the election fall short of the laboratory conditions standard, is directly applicable to the context of the ALRA where in most cases rerun elections must be postponed a full year until a new peak employment period approaches

In the instant case, however, even an application of the Hollywood Ceramics approach does not persuade us that this election should be set aside. Those elections which the NLRB have set aside under the Hollywood Ceramics rule generally involve deliberate mis-statements of fact regarding significant campaign issues made as an integral part of organized campaigning and communicated in such forms as leaflets, radio broadcasts, and speeches. [7/] By contrast, there is no evidence that the statement here was an element of the union's election campaign. Instead the statement was an answer to a question raised by a ranch foreman and was overheard by three employees. It was not embodied in any written campaign material or in any campaign

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[7/] See e.g., Natter Manufacturing Corp., 210 NLRB No. 27 (1974); Dubie-Clark Co., Inc. 209 NLRB No. 21 (1974); Western Health Facilities, Inc., 208" NLRB No. 20 (1974); Cascade Corp., 205 NLRB 103 (1973); Thiokol Chemical Corp., 202 NLRB 434 (1973); Hollywood Ceramics Co., 140 NLRB 221 (1962).

communications directed to employees. The statement related to provisions of the ALRA and thus was information equally available to all the parties. Furthermore, the statement was made to a supervisor who had an immediate opportunity to reply and correct the misleading impression which may have been created.

We, therefore, conclude under all the circumstances, that the statement is not one "likely to have an impact on the election" even under the Hollywood Ceramics standards and does not warrant the setting aside of this election.

Certification issued.

Dated: January 8, 1976

Roger M. Mahony, Chairman

LeRoy Chatfield, Member

Joe C. Ortega, Member

Joseph R. Grodin, Member

MEMBER JOHNSEN DISSENTING

I respectfully dissent from the majority opinion upon the basis that in my view, the totality of circumstances surrounding this election, when coupled with the extremely narrow margin of victory by the UFW, warrants the conclusion that this election should be set aside.

While I agree that the mere holding of a representation election beyond the seven day period set forth in Labor Code section 1156.3(a) may not invalidate an election unless it is established that the delay resulted in possible prejudice to one of the parties, I am not prepared to unequivocally conclude as does the majority, that the delay in this case had virtually no impact on the election in terms of participation by eligible employees. On the contrary, the record discloses that the 25 eligible voters were steadily employed by the employer until the day of the election, which was nine days after the filing of the certification petition by the UFW. However, on this ninth day two eligible employees quit their employment with Cesare & Sons and, as a result, did not appear at the ranch to cast their ballots in the election. By labeling this last minute turnover of two eligible employees "negligible" in a setting where three votes were outcome determinative, I find the majority to have misplaced the emphasis on the pertinent facts of the case.

The glimmer of the 92 percent turnout of eligible voters touted by the majority begins to dim as the UFW's three vote

victory margin is viewed in light of the ninth day departure of two eligible voters and the substantial liklihood of a 100 percent participation had the election been conducted within the statutory seven day period. The disenfranchisement of these two voters by the unexplained delay in the scheduling of this election raises serious questions in my mind regarding the validity of this election.

Turning to the question of the alleged misrepresentation by the UFW on the day before the election, I believe that under the language of Labor Code section 1148 which requires this Board to follow applicable National Labor Relations Board precedent, we must follow the rule announced in Hollywood Ceramics, 140 NLRB 221 (1962), when determining whether an election should be set aside due to a material misrepresentation . Although we have previously departed from following NLRB precedent which we have determined to be inapplicable in the agricultural context, the NLRB's jurisdiction extends to such closely analogous seasonal industries as commercial fruit and vegetable packing sheds, fishing and construction trades and yet, the NLRB has created no special rule regarding material misrepresentations for those enterprises. Likewise, we should create none for agriculture.

Applying the Hollywood Ceramics criteria to the uncontroverted testimony in this case, it becomes apparent that the UFW organizer's misstatement regarding the availability of a new representation election within 60 days if the farmworkers were not satisfied with the union's performance was a substantial departure from the truth, which under the totality of the circumstances, could reasonably be expected to have a significant

impact upon this election.

First, there can be no dispute that the organizer's statement did in fact, constitute a substantial departure from the truth. Rather than providing for such a reelection within 60 days as the organizer stated, section 1156.5 of the Labor Code expressly precludes another representation election in any unit wherein a valid election has been held in the immediately preceding 12-month period. Furthermore, section 1156.6, when coupled with section 1155.2(b), provides that this 12-month certification bar may be extended for up to one additional year where the Board finds that an employer has not bargained in good faith with the currently certified bargaining representative. The parties themselves may agree to extend this election bar, under the language of section 1156.7(b), for a period up to three years pursuant to their collective bargaining agreement. It must be noted, however, that when the collective bargaining agreement extends for longer than 12-months, section 1156.7(c) provides that the agricultural employees may petition to the Board for a decertification election after the expiration of the 12-month certification bar. Thus, the Act prohibits a reelection within 12 months of a valid certification election, clearly contrary to the organizer's statement to the employees that such a reelection was available within 60 days.

Second, in weighing the particular circumstances surrounding the organizer's misrepresentation, we recognize that the UFW's margin of victory in this election was three votes, precisely the number of eligible voters who listened to the

conversation between Salazar and the UFW organizer.

Furthermore, Linda Orosco, one of the employees who heard the organizer's statement regarding the availability of a reelection in 60 days, testified that when the conversation between Salazar and the organizer began, all other conversations among the nearby employees stopped so they could listen, "because we wanted to know what was going on, you know, between the two. It was important to us . . . ." In addition to the employees' interest in the organizer's statements, Ms. Orosco also testified that she did not know how an election for union representation was initiated nor did she know how you "get rid of a contract."

From the testimony of the three employees who listened to the organizer's misrepresentation, it becomes obvious that they had no knowledge of the mechanics of the representation process under the Agricultural Labor Relations Act of 1975 other than that which they learned from the UFW organizers who visited the employer's premises. As the result of the organizer's misstatement which they eagerly listened to, all three believed that if the UFW won the election and the farmworkers became dissatisfied with the union's representation, there could be a reelection within 60 days. We note that the testimony of these three witnesses was uncontradicted and that the UFW introduced no testimony during the hearing to rebut this objection.

In concluding that this election would be set aside even with the application of the Hollywood Ceramics approach since the organizer's statement did not constitute a deliberate misstatement of fact, the majority has departed from the NLRB's

approach in Hollywood Ceramics which expressly rejected giving any weight to whether the misstatement was deliberate or not. This emphasis by the majority is clearly contrary to the NLRB's decision in Hollywood Ceramics, supra, and therefore, constitutes what I consider to be an unwarranted departure from the statutory direction of Labor Code section 1148.

Furthermore, with the organizer's misrepresentation occurring only 24 hours before the election the employer was effectively precluded from making a reply. The majority's reliance upon the presence of Mr. Salazar, the field foreman, to immediately reply on behalf of the employer to the organizer's misrepresentation requires the assumption that Mr. Salazar was knowledgeable with several specific provisions of the Agricultural Labor Relations Act. The record is not only devoid of any factual foundation for this assumption, but rather, supports the more tenable conclusion that Salazar knew absolutely nothing about the Act. Salazar had apparently been employed on and off for 12 years as a farmworker by the employer until his promotion to field foreman two and a half years ago. Additionally, he testified that he had neither voted nor participated in any election held under the Act and that he did not know what happened after the voting in an election was over. The majority's expectation that Salazar was familiar with the Act and could have corrected the organizer's misstatement appears unreasonable based on the record in the case.

I would therefore conclude that the UFW organizer's statement violated the NLRB's rule in Hollywood Ceramics, supra,

and that this basic misconception of the long term effect of a representation election among a sufficient number of employees to affect the outcome could indeed, be reasonably expected to have a significant impact on this election.

Coupling this substantial misrepresentation by the UFW on the eighth day to three voters with the disenfranchisement of two eligible employees resulting from the unexplained delay in conducting the election within the seven day statutory period and the possibility that a third person, Mr. DeLeon, was precluded from voting by the early closing of the polls, requires in my opinion this election to be set aside, particularly in view of the fact that the UFW's margin of victory was three votes.

RICHARD JOHNSEN, JR.

DATED: January 8, 1976.